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FEB 23 2005  
RECEIVED

Via Facsimile:

February 23, 2005

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

FEB 24 2005

Part of  
Public Record

**Re: Finance Docket No. 34335; Keokuk Junction Railway Co. – Feeder Railroad Development Application – Line of Toledo, Peoria & Western Railway Corporation Between La Harpe and Hollis, IL**

Dear Secretary Williams:

This responds to the letter of February 18, 2005, filed with the STB on Friday afternoon before the holiday weekend upon Michael Roper who was then and is currently out of the office on vacation. In his absence I have made a quick inquiry into the matters raised and submit the following reply for your consideration.

Some history of the Bushnell Crossing is in order. The BNSF/TP&W Crossings at Bushnell, IL were governed by a 1932 crossing agreement governing the maintenance, repair and renewal of crossings. (copy attached) Under that agreement, TP&W had obligations to fund part of the expense of maintaining the double diamond crossings at that location. Due to a combination of the following circumstances 1) extremely low levels of TP&W traffic (occasionally only a few cars every few months, I am told) crossing and high volumes of BNSF traffic on double mainline track; 2) local municipal complaints of slow orders backing up mainline track caused by the crossing installations at Bushnell; and 3) high maintenance costs for double diamonds, for which TP&W and BNSF were hard-pressed to justify for the low-density crossing, BNSF arranged to remove the crossings and advised TP&W that, as a temporary measure, the crossing devices would be retained on-site in the event they would need to be re-installed as an emergency measure.

Once the diamonds were removed, the parties negotiated an amendment to the 1932 Crossing Agreement that would avoid the need to have the diamonds retained on-site for emergency installation. Under that Agreement, entitled "Bushnell, IL/Train Handling Agreement Between BNSF Railway Company and the Toledo, Peoria & Western Railway Corporation" effective as of June 2, 2004 (but not finally executed by BNSF until February 1, 2005) (copy attached), BNSF agreed to accommodate TPW crossings via a combination of switching and train handling using the BNSF-ADM Interchange Track. That agreement superseded the 1932 Crossing Agreement and absolved TPW of continued crossing maintenance funding obligations under the 1932 Agreement until such time as the diamonds would be reinstalled. Under that arrangement, no crossing fees or divisions are paid to BNSF by TPW and BNSF has an obligation to "exercise reasonable diligence in the handling of Equipment under this Agreement to accomplish the through movement without undue delay." Also, if TPW requests reinstallation of the Crossing Diamonds, BNSF has a contractual obligation to reinstall the diamonds consistent with the terms of the 1932 Agreement "within a commercially reasonable period of time." Also, in that event TPW requests reinstallation, TPW agreed to bear the cost of the material to replace one of the diamonds (and BNSF would bear the cost for the other diamond). BNSF consented to assignment of that agreement to the Keokuk Junction by a Consent document, dated February 1, 2005 (copy attached).

It is my understanding that the Keokuk Junction requests the following:

- 1) As a temporary measure, until diamonds can be reinstalled, an order that KJ be authorized to "cross-over" BNSF tracks east of Bushnell (at a former crossing at Blair Junction.);

- 2) That BNSF be ordered to reinstall the diamonds at Bushnell for a permanent crossing.
- 3) The BNSF/TPW 2004-2005 agreement concerning alternative arrangements for crossing at Bushnell be disregarded.

Keokuk Junction is essentially request the STB intervene in a private contract matter, although Keokuk Junction refuses to acknowledge the existence of the very contract (referring to it as a "proposal" in its recent submission to the Board), as amended, which has governed the crossing relationships of the parties for over seven decades and recently by amendment addressed what action might be needed if either party wanted the crossing diamonds reinstalled. Nevertheless, we will respond to Keokuk's most recent proposals to the Board:

1) Temporary Alternative Crossing at Blair Junction

BNSF's engineering personnel were on-site yesterday afternoon and have confirmed that a temporary crossing could be installed at the Blair Junction location. It is estimated that would take until approximately March 11, 2005, to accommodate signaling and installation of turnouts, and the cost of that temporary measure would likely exceed \$100,000.00 for a straight-rail installation or \$180,000.00 if two turnouts are required to allow access into Bushnell.

2) Permanent Crossing Installation

Engineering personnel confirmed by inspection yesterday that the crossing diamonds are still on site. However, they have broken components which would require specially ordered fabricated parts to fix. Engineering estimates that, in order to install the old diamonds with newly fabricated parts, it would take approximately 5-6 weeks to specifiable order the parts. Newly ordered diamonds, which are strongly advised by our engineering personnel, are estimated to take 180 days to have specially ordered and installed, depending on the manufacturer's schedule. It is conceivable that, with a rush designation, that timeframe might be shortened to 90-180 days, at additional cost to the parties.

In June 2004, local operating personnel apparently represented by letter to TPW representatives that the diamonds could be reinstalled on an emergency basis in five days. However, that statement was made in the spring/summer of 2004 and prior to completion of the negotiated amendment to the Crossing Agreement by local operating personnel (not engineering experts), in which the parties' authorized representatives negotiated alternative crossing arrangements. That agreement was intended to supersede both the terms of the 1932 Crossing as well as any oral or written representations made by any persons concerning the crossing matter, and the phrase installation "within a commercially reasonable period of time" was openly discussed at that time, wherein TP&W was advised that the diamonds could not be quickly installed, due to the lead time required to order the diamonds.

I am unable to ascertain whether the statements made in the spring/summer of 2004 were accurate at that time, but I have confirmed by consultation with our engineering representative who viewed those diamonds yesterday, that as they exist today, they cannot be installed to accommodate a functioning and safe crossing.<sup>1</sup> As for alleged statements of Keokuk concerning its potential acquisition and desire for installation of the diamonds, I am unaware of those conversations. Due to a short time period to respond, I will not comment at length, except to say that it likely was not clear at that time whether Keokuk would actually acquire the property at the time those conversations were allegedly made. Moreover, BNSF was in the process of concluding its contract arrangements with TP&W to provide arrangements for temporary crossing and terms for reinstallation should a need arise.

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<sup>1</sup> Keokuk carps at the suggestion that the lead time required to install the permanent diamonds at Bushnell is months versus days, but Keokuk can easily confirm that fact by consultation with a qualified manufacturer. These diamonds must be mated to the location and specially fabricated to specification, which takes months, not days. Regrettably, it is understandable that Keokuk would question the lead time based upon the statements made in the spring/summer correspondence of local operating representatives who were unfortunately not completely informed as to the status of the existing diamonds. Certainly, if the diamonds were fit for installation, the lead time to install them would not require substantial time for special ordering fabrication of new diamonds. However, Keokuk can easily confirm upon inspection that the existing diamonds on-site are unsafe for installation, and we offer to have our representatives go on-site with Keokuk representatives to confirm the condition of the diamonds if Keokuk wishes.

3) Abrogation of BNSF's Crossing Contract

BNSF advocates that terms for crossing arrangements not be abrogated. It is unclear to us that Keokuk has an urgent and immediate need for large volumes to cross at Bushnell in view of the condition of Keokuk Junction's trackage. Nevertheless, we are prepared to honor our commitment under the terms of the Crossing Agreement Amendment. We can accommodate immediate volumes at no cost to Keokuk, pursuant to the ADM Interchange arrangements. Admittedly, that arrangement is not optimum for large volumes over the long term, but we are prepared to make that contract arrangement work for the immediate present until such time as permanent diamonds can be installed.

BNSF requests that its Crossing Agreement and the Crossing Agreement be honored. At a minimum, if other extracontractual crossing arrangements are ordered as a temporary measure, once the crossing is permanently installed, BNSF requests that Keokuk be ordered to honor TP&W's commitment to fund one of the crossing diamonds, as agreed, and thereafter continue to honor its funding obligations under the 1932 Crossing Agreement. BNSF submits that Keokuk's acquisition of the TP&W's property should not result in a windfall whereby Keokuk receives crossing rights with no concomitant maintenance funding obligations.

In sum, BNSF suggests that its existing contract arrangements are adequate for immediate accommodation of Keokuk traffic. Alternatively, if that proves to be unworkable (as opposed to mere speculation on Keokuk's part at this time), BNSF would undertake other alternative temporary arrangements at Blair Junction (at substantial cost for interim arrangements, subject to a reasonable lead time to install turnouts and schedule the double track mainline outage) or as another alternative, BNSF would renew its offer to provide reasonable haulage arrangements for Keokuk, if that would suffice under the circumstances. Finally, BNSF, permanent diamonds will be ordered and arranged, and Keokuk should be ordered to fulfill the contractual commitment to fund replacement cost for one-half of that installation, as agreed by TP&W. That agreement was made in lieu of incurring substantial and ongoing maintenance fees under the 1932 Agreement, and it should be honored. Once the diamonds are installed, their ongoing maintenance should continue to be governed by the terms of the 1932 Crossing Agreement, and Keokuk should not be entitled to cross BNSF's double main without some contribution to funding the maintenance of the crossing.

In view of the confusion surrounding the lead time to install the diamonds, BNSF is prepared to submit a verified statement of an authorized engineering representative on that subject should the Board desire verified confirmation of those facts.

Sincerely,



Sarah Whitley Bailiff

Cc: William A. Mullins  
Attorney for Keokuk Junction Railway Co.

**BUSHNELL, IL SWITCHING / TRAIN HANDLING AGREEMENT BETWEEN BNSF RAILWAY COMPANY AND THE TOLEDO, PEORIA, & WESTERN RAILWAY CORP.**

**AGREEMENT** ("Agreement") effective as of this 2nd day of June 2004, ("Effective Date") between **BNSF RAILWAY COMPANY**, formerly known as **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY**, a Delaware Company hereinafter referred to as "**BNSF**" and the **TOLEDO, PEORIA & WESTERN RAILWAY CORP.**, a Delaware Company, hereinafter referred to as "**TPW**".

**WITNESSETH:**

**WHEREAS**, BNSF and TPW are parties to an agreement dated September 16, 1932, as amended ("the 1932 Agreement"), covering the terms and conditions of the maintenance, repair and renewal of certain crossings at Bushnell, IL; and

**WHEREAS**, BNSF and TPW, for economic reasons and efficiencies of operations, desire to remove certain rail diamond crossings at Bushnell, IL; and

**WHEREAS**, in conjunction with removing said rail diamond crossings, certain obligations of TPW will require TPW continued access to its mainline and industry(ies) ("Industry") in Bushnell; and

**WHEREAS**, BNSF is willing and TPW is agreeable to have BNSF provide a service to move TPW's cars and trains over BNSF trackage to accommodate TPW's aforementioned obligations; and

**WHEREAS**, the parties wish to establish and define the terms and conditions under which the diamond crossings will be removed and access to the TPW mainline and industry(ies) will be accommodated.

**NOW, THEREFORE**, it is mutually agreed by and between the parties:

**Section 1. Removal of Crossing Diamonds at Bushnell, IL**

a) BNSF will be responsible for the removal and replacement of the crossing diamonds ("Crossing Diamonds") at Bushnell, IL, as shown on Exhibit A, attached hereto and made a part hereof, at its sole cost and expense. BNSF will be entitled to retain the salvage from said Crossing Diamonds. Upon removal of the Crossing Diamonds, TPW shall have no interest whatsoever in the Crossing Diamonds, any appurtenances thereto, the salvage therefrom, or in the real property underlying the Crossing Diamonds.

b) Upon removal of the Crossing Diamonds, the 1932 Agreement will have no force and effect. However, if the Crossing Diamonds are reinstalled the 1932 Agreement, shall be fully restored and effective in all respects as of the date the Crossing Diamonds become operational. The words reinstall, reinstallation or restore of the Crossing Diamonds, as used in this agreement, shall mean the same as the word "renewal" in the 1932 Agreement.

## **Section 2. Delivery, Pick Up and Transportation of Equipment**

a) For purposes of this Agreement, "Equipment" shall mean trains, locomotives, cars, and cabooses, end of train devices vehicles, and machinery which are capable of being operated on railroad tracks, or operated on right-of-way for purpose of the maintenance or repair thereof. Equipment will remain in the account of TPW at all times. Equipment will be accompanied by necessary data for forwarding to insure delivery. The form of such data will be as mutually agreed between the operating departments of BNSF and TPW. For car liability purposes, including all mileage and per diem, the Equipment will remain in the TPW's account.

b) TPW trackage, located northwest of the former diamond crossing that connects to BNSF's track # 9975 in Bushnell, IL as shown on Exhibit "A" (attached), shall be hereinafter referred to as the ("TPW Interchange Track"). BNSF and ADM Processing trackage, located southeast of the former diamond crossing that connects to TPW trackage in Bushnell, IL as shown between points A, B, C, D, E and F on Exhibit "A1" (attached), shall be hereinafter referred to collectively as the ("BNSF-ADM Interchange Track") with the BNSF owned portion of such track referred to as ("BNSF Interchange Track") as shown on Exhibit A1.

c) For the westward movement of Equipment, TPW shall place Equipment on the BNSF-ADM Interchange Track and BNSF shall pick up and transport the Equipment, using BNSF's crew and BNSF locomotives over BNSF tracks ("Transportation Corridor") as shown on Exhibit A1 and deliver said equipment to the TPW Interchange Track.

d) For the eastward movement of Equipment, TPW shall place Equipment on the TPW Interchange Track and BNSF shall pick up and transport the Equipment using BNSF's own crew and BNSF's locomotives over the Transportation Corridor and deliver said equipment to the BNSF-ADM Interchange Track.

e) Authority for TPW to use ADM Processing tracks will be pursuant to a separate agreement between TPW and ADM Processing. Authority for BNSF to use ADM Processing tracks will be pursuant to a separate agreement between BNSF and ADM Processing.

f) Each party undertakes, and agrees, in respect to its use of the tracks referred to herein and the operation of equipment and appliances thereon and thereover, to comply with all applicable Federal and State laws or regulations, and all applicable rules, regulations and orders promulgated by any Municipality, Board or Commission with respect thereto for the protection of employees or other persons or parties. If any failure by a party to comply with such regulations, laws and rules shall result in a fine, penalty, cost or charge being assessed, imposed or charged against any other party, the offending party agrees promptly to reimburse and indemnify the other party for or on account of such fine, penalty, cost or charge; and further agrees in the event of any such action, upon notice thereof being given by such other party, to defend such action free of cost, charge and expense to the other party.

g) In the event the use of any of the tracks used to deliver, pick up, or transport Equipment, shall be interrupted or traffic thereover be delayed at any time from any cause, no party shall have any claim against the other for liability on account of loss or damage or any kind resulting from such interruption or delay.

h) While performing such services, BNSF shall not be a connecting or intermediate carrier and shall not be entitled to any division of tariff, contract, or switching rates or like charges other than as herein provided and shall provide such services free of charge for TPW. All TPW Equipment while in the physical possession, custody or control of BNSF shall remain in TPW's account. TPW agrees to assume and pay (and indemnify BNSF from) all car hire including mileage and per diem in excess of five (5) days.

i) BNSF shall exercise reasonable diligence in the handling of Equipment under this Agreement to accomplish the through movement without undue delay. The management, operation, dispatching and maintenance of the Transportation Corridor shall, at all times, be under the exclusive direction and control of BNSF, and the movement of Equipment over and along the Transportation Corridor shall at all times be subject to the direction and control of BNSF's authorized representatives and in accordance with such reasonable operating rules as BNSF shall from time-to-time institute. It is expressly understood by the parties that any services provided by BNSF shall use BNSF's existing train service and capacity, with BNSF's locomotives and crews.

j) It is understood and agreed that the BNSF Interchange Track and Transportation Corridor, which is the property of BNSF, may be used by BNSF for other purposes so long as it does not unreasonably interfere with the services provided for herein, and this Agreement does not vest any right of ownership to TPW in the BNSF Interchange Track or the Transportation Corridor.

k) It is understood and agreed that the TPW's delivery tracks are the property of TPW and may be used by TPW for other purposes so long as it does not unreasonably interfere with the ability of BNSF to provide services under this Agreement. This Agreement does not vest any right of ownership to BNSF of TPW's delivery tracks.

### **Section 3. Additions, Retirements, Diamond Restoration and Alterations**

a) BNSF, from time to time, shall have the right, but not the obligation, to make such changes in, additions and betterments to, or retirements from the tracks comprising the BNSF Interchange Track and the Transportation Corridor as shall, in its sole judgment, be necessary or desirable or as may be required by a law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction. Such additions and betterments shall become part of the Transportation Corridor tracks or the BNSF Interchange Track as the case may be and such retirements shall be excluded from the Transportation Corridor tracks or the BNSF Interchange Track as the case may be.

b) At any time, if it becomes necessary, TPW may request BNSF in writing to reinstall the Crossing Diamonds at Bushnell, IL. BNSF shall promptly reinstall the Crossing Diamonds consistent with the terms of the 1932 Agreement. BNSF shall also have the right at its sole discretion to reinstall said Crossing Diamonds consistent with the terms of the 1932 Agreement. Notwithstanding the foregoing, TPW shall only be responsible for the actual cost of the material



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to replace one of the two Crossing Diamonds for which TPW is responsible and BNSF shall be responsible for the cost of the labor to replace the other Crossing Diamond. In the event TPW requests that BNSF shall reinstall the Crossing Diamonds, BNSF shall arrange for completion of restoration within a commercially reasonable period of time from the date of receipt of the TPW request. In the event TPW requests BNSF to reinstall the Crossing Diamonds, or BNSF at its sole discretion reinstalls said Crossing Diamonds, this Agreement shall remain in full force and effect and BNSF will continue to deliver, pick up, and transport TPW Equipment until such time that the Crossing Diamonds are re-installed as stated in Section 19. hereinbelow.

The cost sharing arrangement, as described in this Section 3. b) hereinabove, between BNSF and TPW is for the sole benefit of BNSF and TPW. In the event this Agreement is assigned in accord with Section 16. of this Agreement, complete restoration and replacement of the Crossing Diamonds shall be consistent with the terms of the 1932 Agreement.

#### **Section 4. Maintenance of BNSF Interchange and Transportation Corridor Tracks**

BNSF shall maintain and repair the BNSF Interchange Track and Transportation Corridor tracks with its own supervision and labor. BNSF shall maintain all existing clearances at no less than those in effect on this date. TPW accepts the BNSF Interchange Track AS IS WHERE IS. In consideration of removal of the Crossing Diamonds, BNSF shall provide TPW with serviceable Interchange Track and Transportation Corridor tracks. Furthermore, TPW shall not by reason of failure or neglect on the part of BNSF to maintain or repair the BNSF Interchange Track and Transportation Corridor tracks, have or make any claim or demand against BNSF for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, resulting from any such neglect or failure.

#### **Section 5. Maintenance of TPW Interchange Tracks**

TPW shall maintain and repair the TPW's interchange tracks with its own supervision and labor. TPW shall maintain all existing clearances at no less than those in effect on this date. BNSF accepts the Interchange Track AS IS WHERE IS. TPW does not guarantee, represent or warrant the condition of the interchange track tracks now or in the future or that operation thereover will not be interrupted. Furthermore, BNSF shall not by reason of failure or neglect on the part of TPW to maintain or repair the interchange track, have or make any claim or demand against BNSF for any injury to or death of any person or persons whomsoever, or for any damage to or loss or destruction of any property whatsoever, resulting from any such neglect or failure.

TPW shall also perform, at the sole expense of BNSF, such additional maintenance as BNSF may request.

#### **Section 6. Compensation**

a) TPW shall pay to BNSF during the existence of this Agreement, for all services rendered, \$1.00, or such other good and valuable consideration, annually.

**Section 7. Payment of Bills**

a) Billing shall be accomplished on the basis of data contained in a billing form mutually agreed to between the parties. Such billing forms shall contain sufficient detail to permit computation of payments to be made hereunder. For charges other than Rates, billing shall be prepared according to the rules, additives, and equipment rental rates as published by the BNSF. TPW shall pay to BNSF at the Office of the Treasurer of BNSF, or at such other location as BNSF may from time to time designate, all the compensation and charges of every name and nature which in and by this Agreement TPW is required to pay in lawful money of the United States within thirty (30) days after the rendition of bills therefor. Bills shall contain a statement of the amount due on account of the expenses incurred and services rendered during the billing period.

b) Errors or disputed items in any bill shall not be deemed a valid excuse for delaying payment, but shall be paid subject to subsequent adjustment; provided, no exception to any bill shall be honored, recognized or considered if filed after the expiration of three (3) years from the last day of the calendar month during which the bill is rendered and no bill shall be rendered later than three (3) years (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or liability, after the amount is settled and/or the liability is established.

c) Notwithstanding anything to the contrary in this Agreement, if TPW fails to pay any amounts (Overdue Amounts), then in addition to such Overdue Amounts, TPW shall pay BNSF interest on such Overdue Amounts at a rate of one (1%) percent per month, or portion, thereof, or the maximum interest allowed by applicable law, if lower.

d) So much of the books, accounts and records of each party hereto as are related to the subject matter of this Agreement shall at all reasonable times be open to inspection by the authorized representatives and agents of the parties hereto. All books, accounts, and records shall be maintained to readily furnish full information for each item in accordance with any applicable laws or regulations.

e) Either party hereto may assign any receivables due it under this Agreement; provided, however, that such assignments shall not relieve the assignor of any rights or obligations under this Agreement.

**Section 8. Liability**

The parties shall assume and bear Liability for all Loss and Damage to persons or property in accordance with applicable law.

**Section 9. Insurance Requirements**

Any insurance maintained by TPW which covers TPW's operation on and over BNSF property shall name BNSF as an additional insured.



**Section 10. Labor Claims**

Each party agrees to indemnify and hold harmless the other party against any and all costs and payments, including benefits, allowances and arbitration, administrative and litigation expenses, arising out of claims or grievances made by or on behalf of its own employees, either pursuant to employee protective conditions imposed by a governmental agency as conditions for that agency's approval of this Agreement and operations hereunder, or pursuant to a collective bargaining agreement. It is also the intention of the parties that each party shall bear the full costs of protection of its own employees under employee protective conditions which may be imposed, and of grievances filed by its own employees arising under its collective bargaining agreements with its employees.

**Section 11. Hazardous Materials**

- a) In the event any accident, bad ordered rail car, derailment, vandalism or wreck (hereinafter for the purposes only of this Section 10 called, collectively, "derailment") involving rail cars in the account of TPW carrying hazardous materials, substances or wastes as defined pursuant to Federal or State law (hereinafter called "Hazardous Materials") shall occur on any part of BNSF's property, BNSF shall notify TPW of such incident and any report required by Federal, Provincial, or local authorities shall be the sole responsibility of TPW. TPW shall then advise the BNSF/shipper of Hazardous Materials in rail cars in TPW's account involved in the derailment and shall immediately furnish BNSF with all necessary information related to the Hazardous Materials.
- b) Subject to section 10(e) below, BNSF shall assume responsibility for cleaning up any release of such Hazardous Materials from TPW's rail cars on BNSF's property in accordance with all Federal, Provincial, or local regulatory requirements. TPW, at its sole cost and expense and risk, may have representatives at the scene of the derailment to observe and provide information and recommendations concerning the characteristics of any Hazardous Materials released and the cleanup effort.
- c) If a Hazardous Materials release from TPW's rail cars results in contamination of real property or water adjacent to BNSF's property, BNSF shall assume responsibility for emergency clean up conducted to prevent further damage. BNSF shall be responsible for performing clean up efforts thereafter. Any costs associated with cleaning up real property or water adjacent to BNSF's property contaminated by Hazardous Materials shall be borne in accordance with applicable law.
- d) If Hazardous Materials released from TPW's rail cars must be transferred to undamaged rail cars, TPW shall perform the transfer; provided, however, that if the Hazardous Materials are in damaged rail cars that are blocking BNSF's property, BNSF, at its option, may transfer the Hazardous Materials with any costs associated with such transfer borne by TPW. Transfers of Hazardous Materials by TPW shall only be conducted after being authorized by BNSF.
- e) The total cost of clearing a derailment, cleaning up any Hazardous Materials released during such derailment, and/or repairing any property damaged thereby shall be borne by the TPW

**Section 12. Acts of God**

Whenever a period of time is provided in this Agreement for any party to do or perform any act or thing other than the payment of money for Switching and Storage Services, said party shall not be liable or responsible for any delays due to strikes, extraordinary weather conditions, lockouts, casualties, acts of God, war, court orders, work stoppages, riots, public disorders, criminal acts of other entities, governmental regulations or control or other such causes beyond the reasonable control of said party; provided, however, that the parties shall make reasonable efforts to continue to meet their obligations for the duration of the Act of God to the extent practicable; and provided, further, that the party declaring such Act of God shall notify the other party by wire or other reasonable means when such Act of God begins, the nature of the interruption, and when the Act of God is terminated. Such notices shall be provided as soon as practicable, but in no event after 30 days of commencement and termination of the force majeure event. In any such event, any time period shall be extended for the amount of time said party is so delayed; provided that this Section 11 shall not be construed to affect the responsibilities of said party hereunder to do or perform such act or thing once such delays have been removed, nor shall this provision be construed to extend the term of this Agreement.

**Section 13. No Third Party Beneficiaries**

Nothing herein expressed or implied is intended to or shall be construed to confer upon or to give any person, firm, partnership, corporation or governmental entity other than the parties hereto and their respective successors and assigns any right or benefit under or by reason of this Agreement.

**Section 14. Governmental Approvals**

The parties agree to cooperate in seeking any necessary governmental approvals or authority for operations under this Agreement at any time during its term to the extent such approval or authority may be required under then applicable laws or regulations. In the event any required governmental approvals cannot be obtained this Agreement shall be null and void and of no effect.

**Section 15. Arbitration**

a) If at any time a question or controversy shall arise between the parties hereto in connection with this Agreement upon which the parties cannot agree, either party shall have the right to require a meeting of designated representatives with authority to settle the matter within 30 days of written notice of a desire to meet; if it cannot be resolved within 30 days of the meeting of the parties, then the aggrieved party may demand arbitration. Unless other procedures are agreed to by the parties, arbitration between the parties pursuant to this Section 14 shall be governed by the rules and procedures set forth in this Section 14.

b) If the parties to the dispute are able to agree upon a single competent and disinterested arbitrator within twenty (20) days after written notice by one party of its desire for arbitration to the other party, then the question or controversy shall be submitted to and settled by that single

arbitrator. Otherwise, any party (the notifying party) may notify the other party (the noticed party) in writing of its request for arbitration and nominating one arbitrator. Within twenty (20) days after receipt of said notice, the noticed party shall appoint an arbitrator and notify the notifying party in writing of such appointment. Should the noticed party fail within twenty (20) days after receipt of such notice to name its arbitrator, said arbitrator may be appointed by the American Arbitration Association, which shall designate said appointment from the application by either party after ten (10) days' written notice to the other party. The two arbitrators so chosen shall select one additional arbitrator to complete the board. If the arbitrators so chosen fail to agree upon an additional arbitrator, the same shall, upon application of a party, be appointed in the same manner hereto before stated.

c) Upon selection of the arbitrator(s), said arbitrator(s) shall, with reasonable diligence, determine the questions as disclosed in said notice of arbitration, shall give both parties reasonable notice of the time and place (of which the arbitrator(s) shall be the judge) of hearing evidence and argument, may take such evidence as the arbitrator(s) shall deem reasonable or as either party may submit with witnesses required to be sworn, and hear arguments of counsel or others. If an arbitrator declines or fails to act, the party (or parties in the case of a single arbitrator) by whom the arbitrator was chosen or the American Arbitration Association, as the case may be, shall appoint another to act in the arbitrator's place.

d) After considering all evidence, testimony and arguments, said single arbitrator or the majority of said board of arbitrators shall promptly state such decision or award and the reasoning for such decision or award in writing which shall be final, binding, and conclusive on all parties to the arbitration when delivered to them. The award rendered by the arbitrator(s) may be entered as a judgment in any court in the United States of America having jurisdiction thereof and enforced as between the parties without further evidentiary proceeding, the same as entered by the court at the conclusion of a judicial proceeding in which no appeal was taken. Until the arbitrator(s) shall issue the first decision or award upon any question submitted for arbitration, performance under this Agreement shall continue in the manner and form existing prior to the rise of such question. After delivery of said first decision or award, each party shall forthwith comply with said first decision or award immediately after receiving it.

e) Each party to the arbitration shall pay all compensation, costs, and expenses of the arbitrator appointed in its behalf and all fees and expenses of its own witnesses, exhibits, and counsel. The compensation, cost, and expenses of the single arbitrator or the additional arbitrator in the board of arbitrators shall be paid in equal shares by all parties to the arbitration.

f) The parties may obtain discovery and offer evidence in accordance with the Federal Rules of Civil Procedure Rules 26 - 37, and Federal Rules of Evidence, as each may be amended from time to time.

g) Interest computed annually, at a rate equal to the Prime Rate plus two (2) percentage points (or the maximum interest allowed by applicable law, if lower), shall be applied to any and all arbitration awards requiring the payment of money and shall be calculated from thirty (30) days following the date of the applicable arbitration decision. The term "Prime Rate" shall mean the minimum commercial lending rate charged by banks to their most credit-worthy customers for short-term loans, as published daily in the Wall Street Journal.

**Section 16. Assignment**

Except as provided in Section 7(e), this Agreement and any rights granted hereunder may not be assigned in whole or in part by any party without the prior written consent of the other party. This Agreement may be assigned by any party without the consent of the other only as a result of a merger, corporate reorganization, consolidation, change of control or sale of all or substantially all of its assets. In the event of an authorized assignment, this Agreement and the operating rights thereunder shall be binding upon the successors and permitted assigns of the parties.

**Section 17. Default and Termination**

In the event of any substantial failure on the part of the BNSF to perform its obligations under this Agreement, and its continuance in such default for a period of Thirty (30) days, TPW shall have the right, at its option, after first giving ten (10) days' written notice thereof by personal service or by certified mail, and notwithstanding any waiver by the TPW of any prior breach thereof, to terminate this Agreement and in the exercise of such right, TPW shall not impair its rights under this Agreement or any rights of action against BNSF for the recovery of damages.

**Section 18. Disclosure**

No party may disclose any of the terms of this Agreement to any non-party without the prior written consent of the other party except (1) as required by law or in any proceeding at the Surface Transportation Board; (2) to a corporate parent or substantially owned or controlled in common subsidiary or affiliate; (3) to ADM Processing and any customer affected by the service provided under this Agreement; or (4) to auditors retained by a party for the purpose of assessing the accuracy of charges; if and only if, the auditor agrees in a legally binding instrument that it will abide by this confidentiality clause as if the auditor was a party to this Agreement. Each party agrees to indemnify the other from and against any damage suffered by a party as a result of any disclosure by auditor(s) in violation of this confidentiality provision and each party hereto shall also have a right to specifically enforce the terms of this Section without prejudice to any other rights or remedies under this Agreement.

**Section 19. Term**

This Agreement shall remain in full force and effect so long as the Crossing Diamonds located at Bushnell, IL are removed. This Agreement shall terminate at such time as the Crossing Diamonds are reinstalled.

**Section 20. Notices**

Any notice required or permitted to be given by one party to the other under this Agreement shall be addressed as follows:

If to the BNSF:

Assistant Vice President Contracts and Joint Facilities  
BNSF Railway Company  
2800 Lou Menk Drive  
Fort Worth, TX 76161-0034

If to the TPW:

General Manager  
Toledo, Peoria and Western Railway  
1990 East Washington Street  
East Peoria, IL 61611-2961 USA

and to:

VP-Regulatory Counsel  
RailAmerica, Inc.  
5300 Broken Sound Blvd  
Boca Raton, FL 33487

**Section 21. Severability**

If any part of this Agreement is determined to be invalid, illegal or unenforceable, such determination shall not affect the validity, legality or enforceability of any other part of this Agreement and the remaining parts of this Agreement shall be enforced as if such invalid, illegal or unenforceable part were not contained herein.

**Section 22. Governing Law**

The terms of this Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without regard to its conflicts of laws provisions.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the Effective Date.

**BNSF RAILWAY COMPANY**

By: D. B. Valentine

Printed: D. B. VALENTINE

Title: AUP CONTRACTS & JOINT FACILITIES

Date: 2/01/2005

**THE TOLEDO, PEORIA & WESTERN RAILWAY CORP.**

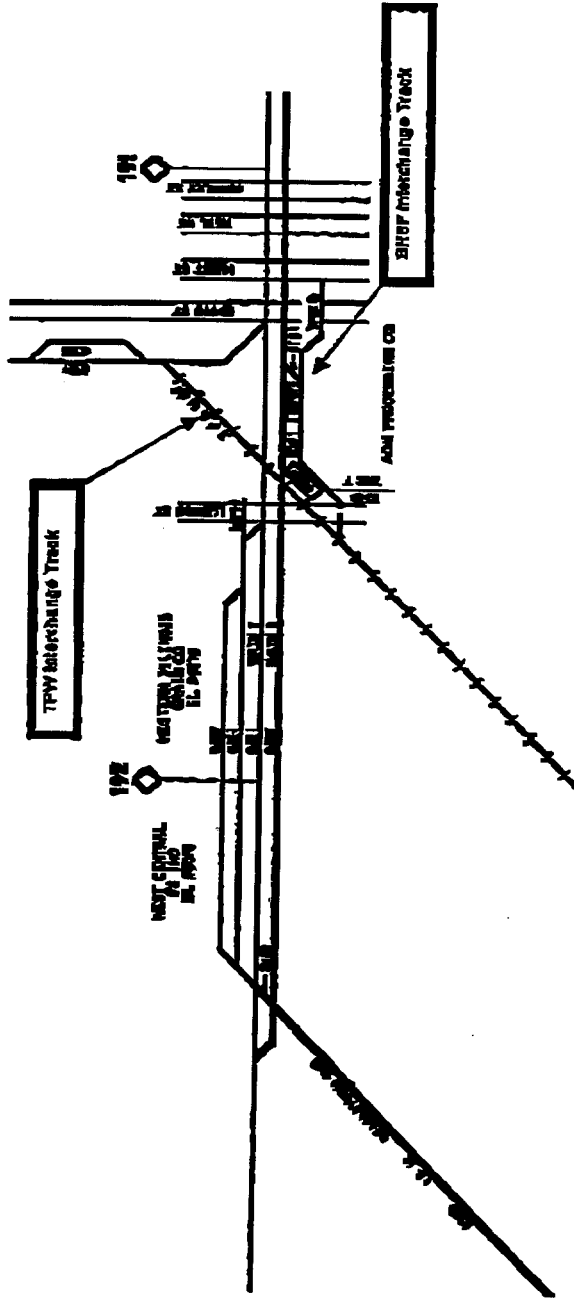
By: Sandra K. Frangen

Printed: Sandra K. FRANGEN

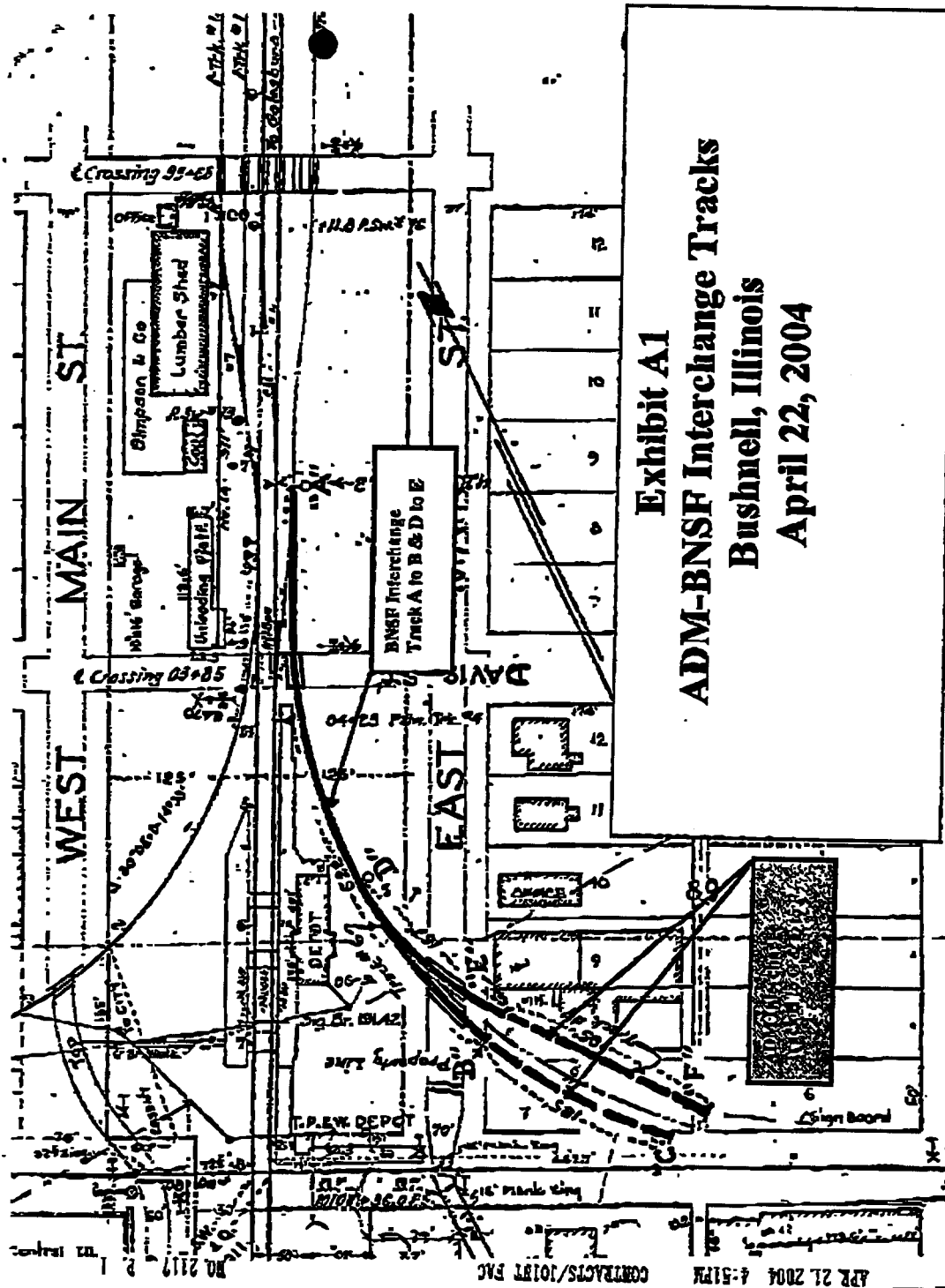
Title: VP - Contracts

Date: June 1, 2004

Exhibit "A" to Busnell Switching







**Exhibit A1**  
**ADM-BNSF Interchange Tracks**  
**Bushnell, Illinois**  
**April 22, 2004**

APR 21 2004 4:51PM

CONTRACTS/JOINT FNC

FD-502 (Rev. 4-15-64)

NO. 007 11 1

## CONSENT TO ASSIGNMENT

Description of Agreements Between The Burlington Northern & Santa Fe Railway Company ("BNSF") (And Its Predecessors, Burlington Northern Railroad Company ("BN"), St. Louis-San Francisco Railway Company ("Frisco") and The Atchison, Topeka and Santa Fe Railway Company ("ATSF")) And Toledo, Peoria & Western Railway Corp (TPW). Segment of TPW to be conveyed to KJ per STB Finance Docket No. 34335 is between MP 194.5 Station Name: LaHarpe, IL to MP 118.0 near Station Name: Hollis, IL.

Pursuant to the Agreement, Toledo, Peoria & Western Railway Corporation ("TPW") will assign its interest in the Scheduled Agreements to KJ Railway (KJ).

### Scheduled Agreements

- 1) Bushnell, IL Switching / Train Handling Agreement Between The Burlington Northern and Santa Fe Railway and The Toledo, Peoria, & Western Railway Corp.
- 2) Maintenance and Repair Agreement, dated September 16, 1932, by and between Chicago, Burlington & Quincy Railroad Company and TPW, as amended November 1, 1939

Consent to Assignment Accepted by BNSF per signature below.

The Burlington Northern & Santa Fe Railway Company

D. B. Valenzuela, RVP Contracts & Ticket Facilitation  
Name and Title of BNSF Signatory

2/9/2005  
Dated

THIS AGREEMENT, made and entered into this 16th day of September, 1912, by and between the CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, a corporation, hereinafter called the "Burlington Company", as party of the first part and TOLEDO, PEORIA & WESTERN RAILROAD, a corporation, hereinafter called the "Peoria Company", as party of the second part.

W I T N E S S E T H:

WHEREAS, the single track railroad of the Peoria Company now intersects and crosses the tracks of the Burlington Company at points in the southeast quarter of section thirty-three (33), township seven (7) north, range one (1) west of the fourth principal meridian, in the City of Bushnell, McDonough County, Illinois, as more particularly shown at points marked "B", "C" and "D" upon the print No. 70870, hereto attached, marked Exhibit "A", identified by the signature of W. F. Zane and made a part hereof; and,

WHEREAS, the Toledo, Peoria & Western Railway Company, (predecessor of the Peoria Company) as party of the first part, and the Burlington Company, as party of the second part, entered into an agreement in writing dated April 27th, 1911, relating among other things, to the maintenance of said crossing and division of the cost thereof; and,

WHEREAS, George P. McNear, Jr., Purchaser, and the Peoria Company, assignee of Purchaser of the property of the Toledo, Peoria & Western Railway Company, under foreclosure sale held June 11, 1926, pursuant to the terms of the foreclosure decree, gave notice that such Purchaser and assignee of Purchaser and Grantee in the deed of said property from Edward P. Allen, Special Master, et al, dated March 31, 1927, elected to refuse to adopt or continue in force after March 30, 1928 the said agreement dated April 27, 1911; and,

WHEREAS, the Burlington Company claims that the Purchaser or assignee of the Purchaser at said foreclosure sale was without legal right or authority to terminate said agreement dated April 27, 1911; and,

WHEREAS, the parties hereto desire to set forth the terms and conditions of the maintenance, repair and renewal of said crossings "B", "C" and "D" at Bushnell, Illinois, and of the construction, maintenance, repair, renewal and operation of (1) a manually controlled interlocking plant (to be installed in and operated from the depot building of the Burlington Company) as to crossings "B" and "C" and (2) of a gate as to crossing "D" to govern and protect the operation of trains of the parties hereto over said crossings.

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements of the parties hereto as hereinafter set forth, it is agreed by and between the parties hereto as follows:

ARTICLE I

The Burlington Company hereby confirms the right in the Peoria Company to maintain, as now located, its single main track at grade over and across the original single main track of the Burlington Company in the location indicated on said blue print No. 70870 at the point marked "C".

The Peoria Company, its successors and assigns shall, during the term of this agreement at its own expense (1) keep and maintain (and renew when necessary) a good and sufficient crossing, (a crossing for the purpose of this agreement being defined as crossing frogs, movable points, track fastenings, compromise joints, crossing timbers, substructure, road bed and ballast there-

for, good and sufficient drainage and all other appurtenances necessary for such crossing) of standard pattern and of weight and section of rail required by the Burlington Company for its track at said point "C", (2) keep and maintain the upper surface of the rails in the Peoria Company's track level with the upper surface of the rails in the Burlington Company's track; and (3) adjust the said crossing to any physical change made at the site thereof at any time by the Burlington Company in (a) its property and (b) the elevation or alignment of, or weight of rail in, the Burlington Company's track, as long as the crossing is maintained at grade.

If the Peoria Company shall, in the opinion of the Burlington Company, fail properly to maintain, repair and renew said crossing at said point "C", then the Burlington Company, as agent of the Peoria Company may, after serving upon the Peoria Company ten (10) days written notice of its intention so to do or without notice in case of emergency, make any necessary repairs, renewals or installations, and the Peoria Company shall reimburse and repay to the Burlington Company the full amount of all expenses incurred by the Burlington Company in connection therewith; provided, however, that nothing herein contained shall be construed as releasing or relieving the Peoria Company from any liability for having failed properly to maintain, repair and renew said crossing.

#### ARTICLE II

The Peoria Company hereby confirms the right in the Burlington Company to maintain, as now located, its second main track and its single main track at grade over and across the single main track of the Peoria Company in the location indicated on said blue print No. 70870 at the points marked "B" and "D" respectively.

The Burlington Company, its successors and assigns shall, during the term of this agreement, at its own expense, (1) keep and maintain (and renew when necessary) good and sufficient crossings as heretofore defined of standard pattern and of weight and section of rail required by the Peoria Company for its track at said points "B" and "D", (2) keep and maintain the upper surface of the rails in the Burlington Company's tracks level with the upper surface of the rails in the Peoria Company's track; and (3) adjust the said crossings, or either of them, to any physical change made at the site thereof at any time by the Peoria Company in (a) its property and (b) the elevation or alignment of or weight of rail in, the Peoria Company's track as long as the said crossings are maintained at grade.

If the Burlington Company shall, in the opinion of the Peoria Company, fail properly to maintain, repair and renew said crossings at said points "B" and "D", or either of them, then the Peoria Company, as agent of the Burlington Company may, after serving upon the Burlington Company ten (10) days written notice of its intention so to do or without notice in case of emergency, make any necessary repairs, renewals or installations, and the Burlington Company shall reimburse and repay to the Peoria Company the full amount of all expenses incurred by the Peoria Company in connection therewith; provided, however, that nothing herein contained shall be construed as releasing or relieving the Burlington Company from any liability for having failed properly to maintain, repair and renew said crossings, or either of them.

#### ARTICLE III

Either the Burlington Company or the Peoria Company, shall have the right at any time hereafter, to lay down, maintain and operate at grade one additional track over and across the track or tracks of the other party within the limits of its present right of way at said points of crossing "B", "C" and/ or "D", and it is agreed that in the construction, operation or maintenance of said additional track the party so constructing and operating the same shall not in any way impair the usefulness of the then existing

track or tracks of the other party.

The party so constructing the said additional track shall bear (1) the entire cost of construction, maintenance, repair and renewal of the additional crossing or crossings of the track or tracks of the other party hereto, (2) the entire cost of such changes in or additions to the interlocking plant hereinafter referred to as are necessary for the protection of train operations over said additional crossing or crossings, and (3) the cost of maintenance, repair, renewal and operation (to be determined on the unit basis hereinafter referred to) of such additions to said interlocking plant. The provisions of Articles I and II of this agreement shall also be applicable to any additional track constructed by either party hereto under the provisions of this Article III.

#### ARTICLE IV

The Burlington Company, concurrently with the construction of the interlocking plant herein provided for, shall, at its own sole cost and expense, construct and thereafter maintain, repair, renew and operate a gate at the location shown on exhibit "A" hereto attached, to control the movement of trains of both parties over the crossing shown at point "D" on said exhibit "A". The normal position of said gate shall be across the track or tracks of the Burlington Company. When a train of the Burlington Company desires to use said crossing, an employe of the Burlington Company shall, if no train of the Peoria Company is approaching, line said gate across the track or the Peoria Company, but immediately after said train of the Burlington Company shall have crossed over said crossing, said gate shall be relined by said employe of the Burlington Company in normal position and shall so remain at all times except when the crossing is actually in use by a train of the Burlington Company.

Such gate shall be construed to be the separate and exclusive equipment of the Burlington Company and the employes operating the same shall be construed to be the sole employes of the Burlington Company when determining the responsibility for the loss, damage, injury or death of either persons or property under the terms of Article XVI of this agreement.

#### ARTICLE V

Subject to the provisions of Article VIII hereof, the Burlington Company shall furnish the necessary labor and material therefor and shall construct an interlocking plant for the purpose, among other things, of controlling the operations of engines, trains and cars of the parties hereto over said crossings "B" and "C", the said interlocking plant to be operated from the station building of the Burlington Company at Bushnell, Illinois. The said interlocking plant shall be constructed in accordance with detail plans and specifications therefor, to be approved by the Signal Engineers of the parties hereto, respectively. The total number of operated units in said interlocking plant as same shall be constructed hereunder shall be 116 units, of which 95 units (81.9%) will be located in the tracks of the Burlington Company and 21 units (18.1%) in the tracks of the Peoria Company. Said print No. 70870 shows the location of all units which will be connected with said interlocking plant, and print labeled "distribution of interlocking units", also hereto attached, marked Exhibit "B", and made a part hereof, shows the distribution of said units as between the Burlington and Peoria Company.

#### ARTICLE VI

Whenever in this agreement the unit basis or proportion is referred to, or either party's proportion is agreed to be upon the unit basis, it is understood and agreed that the table of interlocking units recommended by the Signal Section of the American Railway Association published in the manual of said Section as of July 1930 shall be used. Each party's unit proportion shall be the ratio of the number of units in its tracks to the total number of units in the completed plant.

The term "interlocking plant" as used herein shall be held and taken to include the portion of the station building of the Burlington Company occupied by said interlocking plant and machinery therein, also all signals, connections, appliances, and appurtenances of every kind necessary for the operation and control of the switches, derails (if any) movable point frogs and slip switches to be operated and controlled thereby, but the term "interlocking plant" shall not be construed to include rails, cars, frogs, switches, derails, movable point frogs, slip switches, rail braces, rail joints, switch rods, tie plates or any other track material whatsoever.

The classification of the Interstate Commerce Commission in effect at the time when expenditures are made shall be followed in determining whether such expenditures are a part of the cost of constructing or making additions or betterments to said interlocking plant and, therefore, chargeable to capital account, or whether such expenditures are a part of the cost of operating, maintaining, repairing or renewing said interlocking plant and are chargeable to operating expenses.

#### ARTICLE VII

Upon the completion of said interlocking plant, the Peoria Company shall pay to the Burlington Company, within twenty (20) days after the receipt of bills therefor, 18.1 per cent of the total cost of the construction of said interlocking plant, excluding any portion of said station building, (subject to the provisions of Article VIII hereof) and upon such payment being made the ownership of said interlocking plant (but not including any portion of the station building of the Burlington Company) shall be vested in the parties hereto respectively, in the proportion that the number of units in the track of each of said parties bears to the total number of units in said plant.

It is understood and agreed that the said interlocking plant may be enlarged or decreased at the request of either party hereto, provided the other party hereto concurs therein, the entire cost thereof to be borne by the party for which such increase or decrease is made, and thereupon the ownership of said interlocking plant and the cost of maintenance, repair, renewal and operation thereof shall be reapportioned between the parties hereto in accordance with the number of units of each of the parties hereto composing said interlocking plant after such changes or additions are made, and Exhibits "A" and "B" shall be revised to show such changes. The revised Exhibits "A" and "B" when authenticated by the signatures of the Signal Engineers of the respective parties hereto, shall be and become a part of this agreement.

#### ARTICLE VIII

In connection with the construction and installation of said interlocking plant and of any changes, additions, betterments or improvements thereto and the subsequent operation, maintenance, repair and renewal thereof, each party shall, at its sole cost and expense, with respect to its own tracks and property,

- (a) Do all track work and furnish all track material (including switch and special ties) in place, ready to be connected, and thereafter maintain, repair and renew the same;
- (b) Furnish location and space, at required distance from track and at proper grade, for signal foundations and other connections;
- (c) Keep all tracks, switches, etc. free from ice, snow, dirt or other obstruction which might interfere in any way with the proper working of the interlocking plant;
- (d) Furnish in place all necessary insulated switch rods, insulated gauge plates and insulated rail joints;
- (e) Prepare the tracks for track circuits and provide proper drainage for all apparatus and connections;

- (f) Provide space under tracks for trunking, conduits and other operating connections;
- (g) Provide cross-arms, pins, insulators and line wire and the supports therefor;
- (h) Do all grading, ballasting, banking, filling or cribbing and remove all debris necessary for the completion of the work and thereafter maintain such grading, ballasting, banking, filling and cribbing; and
- (i) Provide necessary permits for the erection of all buildings and apparatus and for digging in streets and public highways and, where necessary, take up and replace all planking and/or paving on public and private highways.

In addition to the foregoing, each party hereto shall, at its own expense, keep all signals located along its own tracks properly painted.

#### ARTICLE IX

After the completion of said interlocking plant as hereinabove provided, the Burlington Company shall, but subject to the provisions of Article VIII hereof, operate and maintain the same and shall repair and renew the same and/or any part thereof as often as may be necessary to keep the same in good operating condition. The Burlington Company shall also maintain and replace oil, wicks, globes, etc. for the lights in the signals along the railroads of both parties hereto constituting a part of said interlocking plant and the cost and expense thereof shall be treated as an expense of operating said interlocking plant. If electric lights are used in the place of oil lamps, the care of same, including supplying electric current therefor shall also be the duty of the Burlington Company hereunder and the cost and expense therefor shall be treated as an expense of operating said interlocking plant.

The Peoria Company shall, monthly within twenty (20) days after receipt of bills therefor from the Burlington Company, pay its unit proportion (as shown on exhibit "E" or any revision thereof) of all cost and expense paid or incurred by the Burlington Company in said maintenance, repair, renewal and operation of said interlocking plant.

The manual operation of said interlocking plant shall be performed by employees of the Burlington Company at its station building at Bushnell, Illinois, and such employees shall not be required hereunder to handle any telegrams, train orders or other communications by telegraph or telephone for the Peoria Company. Salaries chargeable to the cost of operating the said interlocking plant shall be at rates currently paid by the Burlington Company to laymen for similar work in that territory. Such proportion of the time of such employees (including dead time) as is devoted to the operation of said interlocking plant shall be charged to the cost of operation of said plant. The proportion of the time of such employees to be charged to the operation of said interlocking plant (including the proportion of so-called "dead time" of such employees) shall be agreed upon by the Division Superintendents of the parties hereto, and when so determined shall remain the basis until a new basis is agreed upon. Each of the parties hereto shall have the right during the continuance of this agreement to demand a reapportionment of the time of such employees to be charged to the cost of operating said interlocking plant, upon giving the other party thirty (30) days' notice in writing of its desire to have such reapportionment made; provided, that such notice may not be given by either party oftener than once in each year. In case said Division Superintendents are unable to agree within sixty (60) days after the date hereof, or within sixty (60) days after notice given for a reapportionment as hereinabove provided, the question shall be submitted to the General Managers of the parties hereto, and upon their failure to agree within a further period of sixty (60) days the question shall be submitted to arbitration as hereinafter provided.

The Peoria Company shall also pay to the Burlington Company ten dollars (\$10.00) per month as its proportion of the cost of (1) light, heat and water furnished to, (2) maintenance, repair and



renewal of, and (3) taxes and insurance on, that portion of the station building of the Burlington Company at Bushnell, Illinois used in connection with said interlocking plant.

If the signals of said interlocking plant are lighted by electricity it is agreed that a charge of six dollars (\$6.00) per month may be made by the Burlington as the cost of electricity used for the units to be first installed hereunder. Said amount shall be divided between the parties hereto on the unit basis. The amount of six dollars (\$6.00) per month shall be increased or decreased from time to time by the parties hereto so as to give equitable effect to increases and/or decreases made hereunder in the number of signals lighted by electricity.

#### ARTICLE X

Each of the parties hereto shall, at its own expense, carry its own insurance on that portion of said interlocking plant owned by it and shall likewise return for taxation and pay all taxes and/or assessments that may be levied upon that portion of said interlocking plant owned by it.

#### ARTICLE XI

The Burlington Company shall employ competent persons for the construction, installation, operation, maintenance, repair and renewal of the said interlocking plant, but any such person so employed shall be removed from further service in connection therewith upon written request of the Peoria Company, showing cause.

The wages of all persons employed by the Burlington Company in connection with the construction, installation, operation, maintenance, repair and renewal of the said interlocking plant shall be the same as the standard wages paid by the Burlington Company to its other employees in the same territory for similar service.

The Burlington Company shall furnish for joint account all tools, lubricants, repair parts and other miscellaneous material and supplies whatsoever necessary for the proper operation, maintenance, repair and renewal of the interlocking plant.

In the event the said interlocking plant (except the station building proper in which the Peoria Company has no interest, but including the interlocking apparatus located therein) shall be damaged or destroyed otherwise than through the negligence of the parties hereto or either of them, the Burlington Company shall, within ninety (90) days after such damage or destruction, so repair or rebuild the same as to restore it to as good condition, relatively, as it existed prior to such damage or destruction; and the cost of repairing, rebuilding or replacing the interlocking plant shall be borne by the parties hereto on the said operated unit basis (as shown on exhibit "B" or any revision thereof). Any expense in connection with units retired and not replaced shall be borne wholly by each party hereto with respect to such units in and along its own tracks.

#### ARTICLE XII

In all bills rendered hereunder covering the maintenance, repair, renewal or operation of said interlocking plant or said crossings, there shall be added to all items of labor and material such percentages and charges as may be fixed from time to time by the General Managers Association of Chicago, Illinois, and in effect at the time such labor and material are furnished, to cover the cost of handling, supervision, use of tools, accounting, freight charges and other similar items of expense not capable of exact ascertainment.

Wherever in this agreement reference is made to the amount of expenditures for construction, improvements, betterments and/or additions which is properly chargeable to road and equipment

account under the rules of the Interstate Commerce Commission (or such other governmental body as may have jurisdiction) it is understood and agreed between the parties hereto that such amount shall include percentages to items of labor and material similar to those prescribed in the preceding paragraph hereof for bills covering maintenance, repair, renewal or operation of said interlocking plant.

#### ARTICLE XIII

The books, accounts and records of the Burlington Company pertaining to the construction, installation, operation, maintenance, repair and renewal of said interlocking plant, as well as extensions, additions or betterments thereto and changes therein shall, at all reasonable times, be open to inspection by the properly authorized representatives of the Peoria Company.

#### ARTICLE XIV

The interlocking plant shall be operated in such a way as to cause the least possible delay to traffic, but in case the use of any of the tracks within the limits of the interlocking plant shall be interrupted or traffic thereon or thereover be delayed at any time from any cause whatsoever, neither party hereto shall have any claim against the other for liability on account of loss or damage of any kind resulting from such interruption or delay.

Trains of the same class of either party hereto passing through the limits of said interlocking plant shall be accorded equality of right, privilege and advantage. Trains of either party hereto of a superior class operated through the limits of said interlocking plant shall have precedence over trains of an inferior class operated by the other party hereto.

#### ARTICLE XV

The Burlington Company shall be bound to use only reasonable and customary care, skill and diligence in the construction, installation, operation, maintenance, repair and renewal of the said interlocking plant and the Peoria Company shall not, by reason of any defect in the interlocking plant or by reason of the failure or neglect of the Burlington Company to repair any such defects or by reason of the failure or neglect of the Burlington Company in connection with the operation thereof have or make against the Burlington Company any claim or demand for any loss or damage or injury whatsoever resulting from such defect, neglect or failure. However, should the Burlington Company fail, neglect or refuse to make necessary repairs, to, or renewals or replacements of, said interlocking plant or any part thereof and such failure, neglect or refusal shall continue for a period of thirty (30) days after notice in writing from the Peoria Company to the Burlington Company of the necessity thereof and specifying the same, the Peoria Company may itself make such repairs, renewals or replacements. In case the Peoria Company elects to make such repairs, renewals or replacements it shall have the right to go upon the premises of the Burlington Company for that purpose, and the Burlington Company agrees that it will, upon demand, pay to the Peoria Company its unit proportion of the full cost and expense of such repairs, renewals or replacements of said interlocking plant.

#### ARTICLE XVI

Section 1. The trains, engines and cars of either party hereto, while being operated by such party upon and along the railroad of the other party hereto, shall be deemed to be the trains, engines and cars of the party hereto operating the same and not those of the party owning the railroad upon which the same are being operated.

Trains, engines and cars of railroad companies other than the parties hereto, and the employes, passengers and property thereon, shall, while being moved upon and along the railroad of either party hereto, be deemed to be the trains, engines, cars, employes, passengers and property of the party hereto along whose railroad such trains, engines and cars are being moved.

Except as provided in the first paragraph of this Article XVI, the equipment of either party hereto while in the possession or control of the other party hereto shall be deemed to be the equipment of the party hereto in whose possession or under whose control it is.

Section 2. All persons engaged in the installation, maintenance, repair and/or renewal of any of said crossings covered by this agreement shall, as respects liability for loss, damage, injury or death, while so engaged, be deemed to be the employes of the party hereto whose obligation it is to install, maintain, repair and/or renew said crossing (or crossings as the case may be).

All persons while actually engaged in the construction, operation, maintenance, repair or renewal of said interlocking plant shall, for the purposes of this agreement, be deemed to be "joint employes" of the parties hereto. All persons engaged partly in the construction, maintenance, repair, renewal and/or operation of said interlocking plant and partly in the service not connected therewith shall be deemed joint employes of the parties hereto only while actually engaged in the construction, maintenance, repair, renewal and/or operation of said interlocking plant. All persons engaged in the making of changes in or additions to said interlocking plant for the benefit of both parties hereto shall, as respects liability for loss, damage, injury or death be deemed the joint employes of the parties hereto, but persons engaged in the making of changes in or additions to said interlocking plant for the benefit of only one of the parties hereto shall, while so engaged, be deemed the sole employes of the party for whose benefit such changes or additions are being made. All persons engaged partly in the making of said changes or additions to said interlocking plant for the benefit of both parties hereto and partly in service not connected therewith shall be deemed joint employes of the parties hereto only while actually engaged in the making of said changes in or additions to said interlocking plant. Enginemen and trainmen of each of the parties hereto engaged solely in its own service shall not be considered joint employes hereunder.

Section 3. The crossing frogs and timbers at the intersection of the tracks of the parties hereto at said point "C" shall, for the purposes of this agreement be considered the separate facilities or equipment of the Peoria Company; and the crossing frogs and timbers at the intersection of the tracks of the parties hereto at said points "B" and "D" shall, for the purposes of this agreement, be considered the separate facilities or equipment of the Burlington Company. The crossing frogs and timbers necessitated by the construction of additional tracks hereunder shall, for the purposes of this agreement be considered the separate facilities or equipment of the party hereto for or by which any such additional track is constructed.

Section 4. Liability for injuries to or death of persons whatsoever or damage to or destruction of property whatsoever, including said interlocking plant, the gate at crossing "D", said present crossings, or any additional crossing or crossings, and including also liability imposed by any employers liability or Compensation Law, arising from or growing out of or incident to the maintenance, repair and renewal of said existing crossings, and/or the construction, installation, maintenance, repair and renewal of any additional crossing or crossings, and the operation of trains, engines and cars thereover, and/or arising from or growing out of or incident to the construction, maintenance, repair, renewal or operation of the gate at crossing "D" or of said interlocking plant, and/or the making of changes in or additions thereto hereunder, shall be

apportioned between the parties hereto as follows:

When due to

- (a) the acts or omissions of a sole employee (or sole employees, as the case may be), of either party hereto, or to
- (b) the concurring acts or omissions of a joint employee or joint employees and of a sole employee or sole employees of either party hereto

it shall be borne solely by the party hereto whose sole employee or sole employees are concerned.

When due to

- (c) defects in or failures of any kind in the exclusive equipment or facilities of either of the parties hereto

it shall be borne by such party.

When due to

- (d) the concurring acts or omissions of sole employees of both parties hereto; or to
- (e) the concurring acts or omissions of a joint employee or joint employees and of the sole employees of both the parties hereto; or to
- (f) the sole acts or omissions of any joint employees; or to
- (g) the acts of third persons; or to
- (h) unknown or concealed causes making it impossible to determine the responsibilities; or to
- (i) the failure or or any defects in any part of said interlocking plant; or to
- (j) an act of war, or fire, the origin of which shall be unaccounted for

it shall be borne by each of the parties hereto as to

- (1) its own property
- (2) property in its care, custody and control
- (3) its own employees, passengers or patrons and all others at or about said crossing (or crossings) or interlocking plant in connection with the transaction of business with its line of railroad;
- (4) while as to third persons and their property, and joint employees and their property, all such liability shall be borne by the party hereto whose engines, trains, cars or sole employees are concerned in the accident resulting in such injury, death, damage, or destruction; except that if the engine, trains, cars and sole employees of both parties are concerned in such accident, then such liability shall be borne by the parties hereto jointly and equally.

All liability in connection with or incident to the maintenance, repair and renewal of said existing crossing and/or the construction, installation, maintenance, repair and renewal of any additional crossing or crossings, and the operation of trains, engines and cars thereover, the apportionment of which is not herein otherwise provided for, shall be borne by the parties hereto jointly and equally. All liability arising from or growing out of or incident to the construction, maintenance, repair, renewal or operation of said interlocking plant or the making of changes in or additions thereto hereunder, the apportionment of which is not herein otherwise specifically provided for shall be borne by the parties hereto in the same proportions that the cost of maintenance of said interlocking plant is borne by the parties hereto during the month in which said accident occurs.

All liability in connection with or incident to the construction, maintenance, repair, renewal or operation of the gate at crossing "D", the apportionment of which is not herein otherwise provided for, shall be borne by the parties hereto jointly and equally.

Section 5. If it shall be impossible to determine whether any person is an exclusive passenger, patron or employe of either party hereto then the liability for injury to or death of such person or loss of or damage to the property of such person shall, except as herein otherwise provided, be apportioned as in the case of third persons.

Section 6. If a judgment shall be recovered against either of the parties hereto on account of any liability which the other party, under the provisions of this agreement should bear or satisfy, in whole or in part, then such last mentioned party shall, on demand of the party against whom such judgment was recovered, promptly repay to the other party any moneys which that party may have paid or have been required to pay on account of such liabilities together with all costs, fees and other expenses incurred in defending such suit, or a proportionate share thereof if such liability is to be divided between them; provided, however, that neither party shall be concluded by any judgment at law or in equity against the other party unless it shall have had reasonable notice from such other party requiring it to appear in any action or suits and make defense thereto for its own account or jointly with the other party. If such notice shall have been given by one party to the other and the party receiving the same shall have failed to appear and make defense it shall be concluded by the judgment or decree in such suit.

Neither party hereto shall make any compromise or settlement hereunder in excess of the sum of One Thousand Dollars (\$1000) without authority in writing of the other party, but any settlements made by any party hereto in consideration of such sum or a less sum shall be binding on the other party hereto.

Section 7. All releases taken pursuant to the settlement of any and all claims involving joint liability, shall include both parties hereto and copies thereof shall be furnished to each of them.

#### ARTICLE XVII

If at any time a question shall arise touching the construction of any part of this agreement, or concerning the business or manner of transacting the business carried on under the provisions hereof, or concerning the observance or performance of any of the conditions herein contained, upon which question the parties hereto cannot agree, such question shall be submitted to the arbitrament of three disinterested persons to be chosen, one by the Burlington Company, one by the Peoria Company, and one by the two so chosen. The party desiring such arbitration shall select its arbitrator and give written notice thereof to the other party, and shall in such notice state precisely the matter or matters which it proposes to bring before the arbitrators; and only the matters so stated shall be considered or decided by them. If either party shall fail to name an arbitrator within ten (10) days after notice as aforesaid has been by the other party given to it, the arbitrator named by the party giving such notice may and shall name and appoint an arbitrator for and in behalf of the party so in default, and the arbitrator so named and appointed shall have the same power and authority as if he had been chosen by such party. If the two arbitrators so chosen shall fail to select a third arbitrator within ten (10) days after the selection of the second arbitrator as aforesaid, such third arbitrator may be appointed, upon ten (10) days notice by either party hereto to the other party of its intention to make application therefor, by any Judge of the District Court of the United States for the

District which shall then include Bushnell, Illinois. The arbitrators shall, as soon as possible after their selection, meet to hear and decide the questions submitted to them, and shall give to each party reasonable notice of the time and place of such meeting. After hearing both parties and taking such testimony or making such investigation as they may deem necessary, they shall make in writing their award upon the question or questions so submitted to them and shall serve a copy of such award upon each party hereto, and the award of such arbitrators, or a majority of them, shall be final and binding upon both parties, and each or either party shall immediately make such changes in the conduct of its business or such payment or restitution as the case may be as in and by such award may be required of them respectively. The books and papers of both parties, so far as they relate to matters submitted to arbitration, shall be open to the examination of the arbitrators and the party against whom the award shall be made shall pay all the fees and expenses of the arbitrators. Until the arbitrators shall make their award upon any question submitted to them, the business, settlements and payments to be transacted and made under this agreement shall continue to be transacted and made in the manner and form existing prior to the rise of such question.

## ARTICLE XVIII

All notices given hereunder may be given by serving the same upon any executive or general officer of the party upon which the notice is to be served.

## ARTICLE XIX

The provisions of this agreement relating to the construction, maintenance, operation, repair and renewal of said crossings "B", "C" and "D", as shown on said blue print hereto attached, shall take effect retroactively as of the 30th day of March, 1928, and the provisions of this agreement relating to the gate at crossing "D" and to said interlocking plant shall take effect as of the date hereof. All of the provisions hereof shall remain in full force and effect and be binding upon the parties hereto, their successors and assigns, so long as the railroads of the parties hereto intersect and cross each other at said points "B", "C" and "D", as shown on said blue print hereto attached. The said agreement of April 27th, 1911 is hereby agreed to be cancelled as of the 30th day of March, 1928.

IN WITNESS WHEREOF, the parties hereto have executed this instrument in duplicate, the day and year first above written.

CHICAGO, BURLINGTON &amp; QUINCY RAILROAD COMPANY

Approved as to form

By (Sgd) E. P. Bracken,  
Executive Vice President.  
(Sgd) Thos. J. Lawless,  
General Attorney.

TOLEDO, PEORIA, &amp; WESTERN RAILROAD

By (Sgd) Geo. P. McNear, Jr.  
President.

